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No. 80-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA
AND COUNTY TREASURER OF THE
COUNTY OF LOS ANGELES,
Petitioners,

v.

ATTORNEY GENERAL OF THE
STATE OF TEXAS, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be denied because the case as structured by the Court of Appeals is unique and does not present the appropriate vehicle for the general resolution of interstate death tax controversies.

2. Whether the Court of Appeals correctly determined that jurisdiction exists in this action under the Federal Interpleader Statute on the basis of the diversity of citizenship between two adverse claimants, the Texas Administrator of the Hughes Estate (Lummis, a citizen of Nevada) and the County Treasurer of Los Angeles County (Alvord, a citizen of California).

3. Whether the jurisdiction determined to exist by the Court of Appeals is affected by the change in the California inheritance tax law which transfers the claim of the County Treasurer to the State Controller.

PARTIES

Petitioners are Kenneth Cory ("Cory"), Controller of the State of California, and H. B. Alvord ("Alvord"), County Treasurer for the County of Los Angeles, citizens of California. Respondents include William R. Lummis ("Lummis"), Texas Administrator of the Estate of Howard R. Hughes, Jr. ("Estate"), a citizen of Nevada, who is also Nevada Co-Special Administrator of the Estate, Louisiana Provisional Administrator of the Estate, and Delaware Ancillary Administrator of the Estate; Mark White, Attorney General of Texas and Bob Bullock, Comptroller of Public Accounts of Texas, citizens of Texas; Richard Gano, California General Administrator of the Estate, a citizen of California; First National Bank of Nevada, Nevada Co-Special Administrator of the Estate, a citizen of Nevada; and the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
PARTIES	II
TABLE OF AUTHORITIES	III
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR DENYING THE WRIT	5
THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY SUSTAINED JURISDICTION ON A BASIS UNIQUE TO THIS CASE WHICH IS UNAFFECTED BY THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW AND THIS BASIS WILL NOT HAVE GENERAL APPLICATION TO FUTURE CASES	5
1. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MINIMAL DIVERSITY REQUIREMENT OF THE FEDERAL INTERPLEADER STATUTE IS SATISFIED IN THIS CASE.	7
2. THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW DOES NOT AFFECT THE HOLDING OF THE COURT OF APPEALS THAT ALVORD IS A CITIZEN OF CALIFORNIA FOR DIVERSITY PURPOSES.	11
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

	Page
Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975)	11
Austin v. Texas-Ohio Gas Co., 218 F.2d 739 (5th Cir. 1955)	9
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F. Supp. 485 (D. Md. 1962)	10
California v. Texas, 437 U.S. 601 (1978)	8
District of Columbia v. Sweeney, 310 U.S. 631 (1940)	15
Fred Harvey, Inc. v. Mooney, 526 F.2d 608 (7th Cir. 1975)	13
Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970)	14
Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945)	11

CASES

	Page
Hardenbergh v. Ray, 151 U.S. 112 (1893)	13
Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957)	10
Holcomb v. Aetna Life Ins. Co., 228 F.2d 75 (10th Cir. 1955)	9
Huddleston v. Dwyer, 322 U.S. 232 (1944)	11, 12
Kennametal, Inc. v. International Union, 161 F. Supp. 362 (W. D. Pa. 1958)	13
Lummis v. White, 629 F.2d 397 (5th Cir. 1980)	4, 5, 7, 8, 9
Mollan v. Torrance, 9 Wheat (22 U.S.) 537 (1824) (Marshall, J.)	12
Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960)	9, 10
Rice v. Sioux City Memorial Cemetery, Inc., 349 U.S. 70 (1955)	15
Smith v. Allwright, 321 U.S. 649 (1944)	6
Smith v. Sperling, 354 U.S. 91 (1957)	12, 13
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	8, 10
Television Reception Corp. v. Dunbar, 426 F.2d 174 (6th Cir. 1970)	13
Texas v. Florida, 306 U.S. 398 (1939)	8
Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939)	10

CONSTITUTION

U. S. Const. Amend. XI	6, 7

STATUTES

28 U.S.C. § 1251(a)	3
28 U.S.C. § 1254(1)	5
28 U.S.C. § 1331	4
28 U.S.C. § 1332	8, 12
28 U.S.C. § 1335(a)	2, 7, 12
28 U.S.C. § 1343(3)	4
28 U.S.C. § 1397	2
28 U.S.C. § 1404(a)	2, 10
28 U.S.C. § 2361	2, 3
42 U.S.C. § 1983	4

OTHER AUTHORITIES

3A Moore's Federal Practice § 22.09[1] (1979)	10
7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1710 (1972)	10
13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3608 (1975)	12

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr., Deceased, respectfully prays that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 27, 1980 be denied.

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1335(a), 28 U.S.C. § 1397, 28 U.S.C. § 1404(a), 28 U.S.C. § 2361, and sections 14104, 14791, 14793-95 of the California Revenue and Taxation Code, and Chapter 634 California Statutes, 1980.

28 U.S.C. § 1335(a) provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property. . . ."

28 U.S.C. § 1397 provides:

> "Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

28 U.S.C. § 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U.S.C. § 2361 provides:

> "In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United

States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

The California statutes referred to above are set forth in Appendix I of the Petition for Certiorari. 28 U.S.C. § 1251(a) which is set forth in the Petition for Certiorari at page 2 is not involved in this proceeding and is relevant only to the Motion For Leave To File Complaint, No. 88, Original, previously filed with this Court.

STATEMENT OF THE CASE

Respondent Lummis generally agrees with the Statement of the Case contained in pages 3-6 of the Petition for Certiorari ("Petition"). There are, however, two statements in the Petition that require clarification. There are no "principal defendants" in this action as suggested by Petitioners. (Pet. 3) Lummis interpleaded as defendants all those parties asserting competing claims against the Estate, and as the Amended Complaint shows there is no hierarchy among defendants; Alvord, as a claimant was properly joined in this action. The restraining order issued by the district court under 28 U.S.C. § 2361 was applicable to the defendant taxing officials, and not as Petitioners assert (Pet. 4), to the states of California and Texas.

Moreover, there are additional facts which should be noted. The Amended Complaint in this action contained additional bases of jurisdiction which were unnecessary to, and not addressed by, the Court of Appeals' holding that interpleader jurisdiction exists. Included are the diversity which exists between the state taxing officials of California and Texas, a right to travel claim under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), and a constitutional due process claim under 28 U.S.C. § 1331.

The Court of Appeals declined to consider the issue of whether the United States had been properly joined as an interpleader claimant under 28 U.S.C. § 2410(a) because this issue had not previously been decided by the district court. *Lummis v. White*, 629 F.2d 397, 404, n.14 (5th Cir. 1980). The Court of Appeals remanded the issue to the district court for decision. The issue has not reached the district court because the mandate of the Court of Appeals was stayed in connection with the filing of the Petition in this proceeding.

Petitioners sought an order in the District Court for the Western District of Texas to transfer this action to the District of Colorado or, alternatively, to the Central District of California, residence of the County Treasurer, Alvord. The transfer to either location was denied by the district court and the Court of Appeals found that the denial was not an abuse of discretion.

It is not disputed by Petitioners that unless the issue of the domicile at death of Mr. Hughes is decided in a unitary proceeding in which the tax officials of both California and Texas are parties and will be bound, the very real possibility exists that the state courts of each of these states will determine that Mr. Hughes died domiciled in their respective jurisdictions. Because of this, the

Estate is confronted with the prospect of multiple liability and the certainty of multiple vexatious litigation. Inconsistent determinations would permit each state to assess death taxes on the intangible assets of the Estate (which constitute over 99% of its value) despite the fact that under the law of each state a decedent may have only one domicile at death. The total applicable tax rate if both Texas and California were permitted to assess inheritance taxes against the Estate when combined with the federal estate tax, reduced by a state death tax credit, is approximately 101%. *Lummis v. White, supra,* at 398, n.4.

REASON FOR DENYING THE WRIT

THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY SUSTAINED JURISDICTION ON A BASIS UNIQUE TO THIS CASE WHICH IS UNAFFECTED BY THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW AND THIS BASIS WILL NOT HAVE GENERAL APPLICATION TO FUTURE CASES

The Petition for Certiorari filed in this cause by the California taxing officials, although ostensibly a request for the Court to exercise its discretion to review the decision below under 28 U.S.C. § 1254(1), is in reality an attempt to advance its companion Motion For Leave To File Complaint which the California taxing officials simultaneously filed in this Court. (No. 88, Original)[1]

1. This is further evidenced by the novel manner in which Petitioners have chosen to style their Petition for Certiorari attempting to suggest that this jurisdictional dispute is primarily between the taxing officials of California and the taxing officials of Texas. As the proceedings in the courts below plainly show, Lummis initiated this action, interpleading as claimants the taxing officials of Texas and California as well as the other administrators. Lummis prevailed in the Court of Appeals, and Petitioners are now seeking review of that court's judgment in favor of Lummis.

Petitioners here raise for the first time in this case their contention that this action can be heard only under this Court's original and exclusive jurisdiction as a dispute between two states.[2] However, as this case was initially formulated and developed, it was and remains a statutory interpleader suit.

This action, as it reaches this Court, does not present Questions 1, 2 and 5 as set forth in the Petition. Rather, it involves the narrow issue of whether the Court of Appeals properly found that the minimal diversity requirement of statutory interpleader can be satisfied by looking to the citizenship of an interested stakeholder (Lummis) and the citizenship of a county taxing official (Alvord). Petitioners themselves concede the narrowness of this proceeding, "[f]or the reasons already stated, however, the unique circumstances of this case which led the Court of Appeals to find jurisdiction will not be repeated; the decision below is thus an 'adjudication[ ] . . . in[ ] the same class as a restricted railroad ticket, good for this day and trip only.' " (Pet. 15, quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

The Court of Appeals did not decide the issue which was fully briefed in the courts below of whether the

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2. In fact, at oral argument before the Fifth Circuit, Counsel for Petitioners, Mr. Falk, agreed in principle that federal interpleader is proper in this case:

> MR. FALK: No, we don't want to play any procedural game. And I understand why the result [dismissal of the interpleader suit by the district court] in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act.

(Transcript, Oral Arguments, March 31, 1980, at 19.)

citizenship of state officials, where the relief sought is prospective injunctive relief, may be considered for diversity purposes. The court, having found the requisite minimal diversity existing between Lummis and Alvord, looked no further in reaching the conclusion that the elements of statutory interpleader had been satisfied. The Court of Appeals also held that the Eleventh Amendment is no bar to the action brought by Lummis because only prospective equitable relief is sought. *Lummis v. White, supra* at 402. This holding is unchallenged by Petitioners.

Petitioners seek here an unnecessarily broad review of the problem of interstate death tax controversies. While such a review by this Court may be warranted in a petition appropriately presenting the problem, such issues are not presented in this case as structured by the decision of the court below. The decision of the Court of Appeals raises no "special and important reasons" for granting certiorari as required by Supreme Court Rule 17. It does not involve an important question of federal law which should be settled by this Court; it does not conflict with any decision of this Court; and it does not call for an exercise of this Court's "power of supervision." Because the Court of Appeals sustained jurisdiction on a basis unique to this case, this is not a situation which warrants the exercise of this Court's extraordinary and discretionary certiorari jurisdiction.

1. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MINIMAL DIVERSITY REQUIREMENT OF THE FEDERAL INTERPLEADER STATUTE IS SATISFIED IN THIS CASE.

The Federal Interpleader Statute, 28 U.S.C. § 1335, requires that there be two or more adverse claimants of

diverse citizenship who claim or may claim a right to the money or property in the custody or possession of the stakeholder. Only "minimal diversity" is required. *State Farm Fire & Cas. v. Tashire,* 386 U.S. 523 (1967). The requirement of "minimal diversity" is satisfied where two claimants are of diverse citizenship as defined in 28 U.S.C. § 1332. The Court of Appeals affirmed the district court's holding that Alvord was a citizen of California for diversity purposes and concluded that Alvord and the Texas Administrator, Lummis, a citizen of Nevada, were adverse, diverse claimants under the statute.

Petitioners incorrectly suggest that the Court of Appeals hinged its determination that Lummis was an interested stakeholder on the difference between the California inheritance tax rate of 24% and the Texas inheritance tax rate of 16%. (Pet. 11) In fact, the court's opinion plainly shows that it concluded that Lummis was an interested stakeholder, and therefore an interpleader claimant, because as administrator: (1) he has a legal duty to preserve the assets of the estate and to protect those assets against double death tax liability; (2) he asserts that Hughes died domiciled in Nevada; and (3) he stands to collect an administrator's fee. *Lummis v. White, supra,* at 402. The court went on to say that he "asserts a claim to the fund that is adverse to that of the defendant claimants." *Id.* at 403. This holding is consistent with the decription of an interested stakeholder's status as a claimant in *California v. Texas.*[3]

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3. "The bill in the nature of interpleader . . . allows an interested claimant to seek adjudication of all claims to the fund including his own." 437 U.S. 601, 605, n. 5 (1978), citing *Texas v. Florida,* 306 U.S. 398, 406 (1939). (Stewart, J., concurring.)

Petitioners, however, assert that this holding "would have a radical, and plainly undesirable, effect on fundamental principles of federal jurisdiction . . . ," thus warranting review by this Court. (Pet. 16) They assert that considering an interested stakeholder's citizenship for diversity purposes would potentially turn every bilateral dispute into an interpleader action, would give the interested stakeholder the opportunity to bring the action in his own forum, and would "radically" expand interpleader as a remedy. (Pet. 11, 16, 17)

A bilateral dispute does not, by definition, require interpleader resolution. In the "garden-variety dispute between two parties" described by Petitioners (Pet. 16), the stakeholder is not confronted with the threat of vexatious litigation and multiple liability, a necessary element for interpleader jurisdiction. *See, e.g., Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75 (10th Cir. 1955); *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739 (5th Cir. 1955); *Pan Am. Fire & Cas. Co. v. Revere*, 188 F.Supp. 474 (E.D. La. 1960). Here, however, in addition to Alvord's claim, Lummis is exposed to the mutually exclusive tax claims asserted by White and Bullock (Texas taxing officials) and Cory (the other California taxing official). This proceeding therefore is certainly not a bilateral dispute but rather is, as the Court of Appeals noted, a bill in the nature of interpleader. *Lummis v. White, supra*, at 401.

Petitioners express concern that the decision below unfairly permits an interested stakeholder to interplead out-of-state claimants in his own forum without any regard to their "prior contacts" with that forum. This is no different from the situation in any interpleader action in which one or more claimants are not residents of the forum in which the action is brought. Here, as there, the defendant

claimants would have available that change of venue relief contemplated by 28 U.S.C. § 1404(a), if another forum would be more appropriate.

Finally, it should be emphasized that considering the interested stakeholder's citizenship for diversity purposes does not impermissibly expand jurisdiction under the federal interpleader statute. This holding does not conflict with any prior decisions of this Court but instead is in accord with the line of cases in which this Court has interpreted the interpleader statute liberally in order to foster its use as an equitable remedy. *See, e.g., State Farm, Fire & Cas. Co. v. Tashire, supra; Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *see also Haynes v. Felder*, 239 F.2d 868 (5th Cir. 1957); *Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 477, n. 8 (E.D. La. 1960); 7 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1710, at 406 (1972).[4]

The Court of Appeals, finding the requisite minimal diversity between Lummis and Alvord, found it unnecessary to rely on the alternative basis for diversity that exists between the state taxing officials of California and Texas. As four Justices of this Court noted in *California v. Texas*, this action does not involve a suit for recovery of money damages from the state treasury of either California or Texas. This is a suit against state taxing officials

4. What has been suggested to be a contrary view on the question of whether an interested stakeholder's citizenship may be considered appears at 3A Moore's FEDERAL PRACTICE, § 22.09[1] (1979). An examination of this discussion of the subject, however, reveals that this treatise is providing an historical review of the earlier lower court cases which, in order to sustain jurisdiction, held an interested stakeholder's citizenship irrelevant under statutory interpleader.

for prospective relief and, therefore, their citizenship controls for diversity purposes. The Court has before it adverse claimants who are citizens of at least three different states. The minimal diversity requirement for statutory interpleader is clearly present and review by this Court is unnecessary.[5]

2. THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW DOES NOT AFFECT THE HOLDING OF THE COURT OF APPEALS THAT ALVORD IS A CITIZEN OF CALIFORNIA FOR DIVERSITY PURPOSES.

Petitioners contend that, because of a recent change in California inheritance tax law (which became effective January 1, 1981, two and a half years after commencement of this action), Alvord is no longer an adverse claimant in the interpleader action and his citizenship may not be considered in determining jurisdiction in this case.[6] They urge that *Huddleston v. Dwyer*, 322 U.S.

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5. Petitioners urge, as a separate reason for granting certiorari, that they should not be required to submit their tax claim to a jury composed of citizens of Texas. They have cited no authority which elevates this venue question to the stature of a reason for granting certiorari. Further, "the very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716, n. 6 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); *see, e.g., Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 111 (1945). Petitioners' assertion is premature and speculative; there has been no showing that an impartial jury cannot be empaneled in the judicial district where this action was brought.

6. At the time the interpleader action was filed, the California inheritance tax law provided that inheritance taxes were to be paid, in the first instance, to the county treasurer of the county where a decedent was domiciled at death, and the county treasurer would in turn remit the tax to the state controller. The county treasurer would retain a percentage as a "commission." The inheritance tax is now paid directly to the controller.

232 (1944), requires a reexamination, in light of the California statutory change, of the Court of Appeals' finding of diversity jurisdiction. *Huddleston*, however, stands for the proposition that a federal appellate court is required to apply substantive state law then existing when it is reviewing issues which are governed by state law. However, the question of diversity jurisdiction in a federal statutory interpleader action, which is in issue here, is governed not by state law but by federal law. 28 U.S.C. §§ 1332, 1335; *see, e.g., Smith v. Sperling*, 354 U.S. 91 (1957). Thus, *Huddleston* is inapplicable to this proceeding and no reexamination of the holding of the Court of Appeals is necessary.

The fact that California legislature may have modified the inheritance tax law has no effect on jurisdiction in this action. It has long been held in diversity cases that "jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan v. Torrance*, 9 Wheat (22 U.S.) 537, 539 (1824), Marshall, J.). This represents a sound policy decision that diversity jurisdiction should be found to exist or not to exist at the time a suit is commenced. "This approach provides maximum stability and certainty to the viability of the action and minimizes repeated challenges to the court's subject matter jurisdiction." 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3608, at 656 (1975). Because diversity jurisdiction is determined at the time a suit is commenced,[7] and because Alvord was an interpleader claimant adverse and diverse to Lummis at commencement of the suit, proper federal interpleader

7. An action in federal court is commenced with the filing of the complaint. Rule 3, FED. R. CIV. P.

jurisdiction attached at that time and still exists in this action. *See, e.g., Smith v. Sperling, supra; Hardenbergh v. Ray,* 151 U.S. 112 (1893).

The statutory change reflects a legislative assignment of Alvord's claim (collection of the California inheritance tax and retention of a commission) to the controller who now collects the inheritance tax.[8] The change has not altered the nature of this action. The underlying basis of Alvord's claim and Cory's claim are the same—that Hughes was domiciled in California at death. Controller Cory, of course, continues to assert this claim as before. Unlike the situation in *Kennametal, Inc. v. International Union,* 161 F. Supp. 362 (W.D. Pa. 1958), cited by Petitioners, no claim against the fund has been abandoned; the same three competing domicile claims which existed at the commencement of this action are still present.

This transfer of interest from Alvord to Cory may be compared to situations where a diverse party's interest shifts to a non-diverse party without affecting diversity jurisdiction. For example, where, during the pendency of a suit, a diverse tenant's interest shifts to his non-diverse landlord, jurisdiction over the action remains. *Fred Harvey, Inc. v. Mooney,* 526 F.2d 608 (7th Cir. 1975); *accord, Hardenbergh v. Ray,* 151 U.S. at 118. Similarly, in *Television Reception Corp. v. Dunbar,* 426 F.2d 174 (6th Cir. 1970), the original diverse party assigned his

8. It is not suggested that there was a sinister motive behind the change in the California tax law. Whatever the motive, the change in law raises the troublesome problem that, if the general rule is ignored or did not exist, state legislatures could exempt officials from suit in federal court by eradicating or otherwise altering the officials' duties after commencement of an action.

interest to a non-diverse corporation. In rejecting the plaintiff's contention that the assignment to the non-diverse corporation destroyed diversity jurisdiction, the court reiterated the general rule that

> federal jurisdiction is tested according to the facts as they exist at the time an action is initiated and that diversity jurisdiction, once acquired, is not defeated by events occurring subsequent to the commencement of the action. (Citations omitted.) *Id.* at 177.

See also Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970).

Petitioners contend that several categories of situations exist in which federal courts will redetermine diversity after commencement of an action. (Pet. 19-21) Each of these situations, however, involves the application of Rule 19, FED. R. CIV. P., principles to non-diverse parties. If the non-diverse party is indispensable the action must be dismissed. On the other hand, if the non-diverse party is found not to be indispensable, that party will be dismissed in order to preserve jurisdiction. In effect, the posture of the case *after* all indispensable parties have been joined, or non-indispensable parties dismissed, is the critical time as far as a determination of diversity jurisdiction is concerned, because this is the first time at which the case has been structured as it should have been at commencement. Rule 19 and the principles of indispensability have no application in the situation which exists in this case, where the interest of one diverse party is transferred to another party, and the nature of the action remains the same. There was no

need, therefore, for the Court of Appeals to reconsider the issue of jurisdiction. Because jurisdiction was unaffected by the change in California law, Petitioners' Motion For Leave To File Petition For Rehearing Out Of Time was properly denied by the Court of Appeals.

More fundamentally, under Supreme Court Rule 17, the effect of the change in California law on diversity jurisdiction in this action is not an issue which requires review by this Court. The case as structured by the Court of Appeals will not arise in the future because of the change in California law eliminating Alvord as collector of the California inheritance tax. Since the issue of Alvord's diversity cannot recur, the question is therefore not one of public importance. Where a statutory change, occurring subsequent to commencement of litigation, confines the impact of the issue presented to the Court to the case at bar, the issue does not merit consideration by this Court. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940), *denying cert. to* 113 F.2d 25 (D.C. Cir. 1940). As noted in *Rice*:

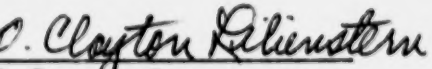
> A . . . question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit for the benefit of the particular litigants. (Citations omitted.) "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. (349 U.S. at 74)

CONCLUSION

This case does not present the appropriate vehicle for examining broad-ranging principles of federalism concern-

ing the resolution of interstate death tax controversies. Uniquely structured as it is, this case, after two and a half years, is on a track toward resolution and does not require review by this Court. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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